STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court**
No. 153324

RODERICK LOUIS PIPPEN,

Defendant-Appellant.

Court of Appeals No. 321487
Lower Court No. 10-006891-01

The People's Brief in Opposition to Defendant's Application for Leave to Appeal with Appendices A and B

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Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

Counterstatement of Question Involved

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy; furthermore, the failure to interview witnesses does not itself establish ineffective assistance of counsel unless it is shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the defense. Defendant's trial counsel testified at the evidentiary hearing that he chose not to call Michael Hudson as a witness because his testimony would reinforce the fact that Defendant was in possession of the murder weapon 90 days after the murder; furthermore, Hudson had been previously convicted of five theft-related offenses, which could have been used to impeach his credibility, and he also told a ludicrous story about how he did not see Defendant discard what turned out to be the murder weapon when he (Hudson) was in close proximity to Defendant when he himself (Hudson) also discarded a gun, both guns being thrown under the same car. Has Defendant sustained his burden of establishing ineffective assistance of counsel due to trial counsel's "failure" to interview and call Hudson as a defense witness?

The People answer no.
Defendant answers yes.
The trial court answered no.

Counterstatement of Facts

Defendant, Roderick Pippen, was charged in an Information in the Third Judicial Circuit Court (Wayne County), Criminal Division, with the following offenses: Count I: first-degree felony murder, with the underlying felony being carjacking, pertaining to victim Brandon Sheffield, in violation of MCL 750.316; Count II: felony firearm, in violation of MCL 750.227b; and Count III: felon in possession of a firearm, in violation of MCL 750.227f. It was alleged that these offenses had been committed on July 21, 2008 in front of 11032 Roxbury in Detroit.

The matter came on for jury trial before the Honorable Timothy M. Kenny on March 17, 2014.

Jury Trial

Witnesses

Prosecution

Valeria Williams

Valeria Williams testified that Brandon Sheffield had been her son (Jury Trial Transcript, 03/19/14, 45). On July 21, 2008, her son had been 19 years old (45). At around that time, her son was working full time and going to school to be a carpenter (46). Also around that time, her son drove around in a 2008 Mountaineer, which she had bought for him (46). She identified People's Exhibit No. 10 as a photograph of the vehicle that she bought for her son (46-47).

During her son's lifetime, she had never heard of a person named Roderick Pippen, or Michael Hudson, or Norman Clark (47).

The last time that she saw her son alive was on July 20, after dinner at around 6:30 p.m. (48). Her son was planning on going down to Hart Plaza with friends that night (48).

On July 21, she identified her son's deceased body (49).

Brett Sojda

Brett Sojda testified that from 1998 until 2012, he was employed as a detective lieutenant with the Michigan State Police (Jury Trial Transcript, 03/19/14, 52). He was assigned to the Northville Forensic Laboratory, in charge of the Firearms and Toolmark Unit (52).

After being qualified as an expert in the field of firearms and toolmark identification (54), the witness testified that he had occasion to examine an item on People's Exhibit No. 20, which was a fired metal-jacketed bullet (55-56). He determined that the bullet was a .38 caliber fired bullet with a right twist (56). He was familiar with the Glock 9 millimeter, Model 17 firearm (60). It had a polygonal right twisting rifling, such that the bullet that he examined could have been fired from a Glock, Model 17, 9 millimeter handgun (60).

He also examined a spent cartridge casing, which he identified as People's Exhibit No. 21 (60). He found the fired cartridge casing to be a 9 millimeter Luger caliber casing, with WIN for Winchester stamped on the head (60). The bullet that he examined on People's Exhibit 20 was caliber compatible with the fired cartridge casing that he examined, such that the bullet could have at one time fit in the cartridge casing (61).

He received the two firearm pieces on People's Exhibits 20 and 21 on July 30, 2008, and he completed his report relative to these two items on August 14, 2008 (61).

Had he had a firearm to compare to the two pieces, he would have test-fired the gun twice into a water tank and would have compared the test-fired bullets and cartridge casings with the bullet

and cartridge casings that he had received by using a comparison microscope (62). A comparison microscope, he explained, was really two microscopes connected by a bridge enabling the person looking through it to look at two things at the same time (62).

In 2011, he was asked by the Wayne County Prosecutor's Office to compare the fired bullet on People's Exhibit No. 20 with a firearm that he identified as People's Exhibit No. 22 (65). He described People's Exhibit 22 as being a Glock, Model 17, 9 millimeter Luger caliber semi-automatic pistol (65). As far as whether the bullet on People's Exhibit No. 20 had been fired from the gun on People's Exhibit No. 22, he could not definitively say that that bullet had been fired out of that gun (68). All that he could say was that it may have been (68). This was because the rifling in the barrel of the gun would not have engaged the bullet to the extent that marking from that barrel would have been left on the bullet as it passed through the barrel (68).

He could say for certain that the bullet on People's Exhibit No. 20 could not have been fired out of a .380 caliber semi-automatic handgun (68).

On cross-examination, the witness testified that he was not asked to do a comparison between the weapon on People's Exhibit No. 22 and the fired cartridge casing on People's Exhibit No. 21 (72).

John Bechinski

John Bechinski testified that he was a forensic pathologist at Sparrow Hospital in Lansing, where he acted as a deputy medical examiner for 12 counties (Jury Trial Transcript, 03/19/14, 76). Wayne County was one of the counties that he served (76). He perfomed the autopsy in this case on July 21, 2008 when he was employed solely by Wayne County as an assistant medical examiner (78).

After being qualified as an expert in the field of forensic pathology (78-79), the witness testified that the cause of death was a gunshot wound to the head (80), and the manner of death was homicide (85), meaning a death caused by another person (85).

The bullet entered the back left portion of the head (81). There was no evidence of close-range firing (81). The bullet passed through the brainstem, as well as the base of the skull on the right side, which resulted in a comminuted fracture to the base of the skull (83). The bullet then passed into the facial bones of the right side of the face, which was where the wound track ended (83). It was there that he recovered a bullet (83). The bullet caused part of the brain to be pulpified, that is, to become very mushy, which meant essentially that it was shredded (83).

Because the bullet first passed through the brainstem, which was what controlled the cardio-respiratory center and regulated the heartbeat, the deceased died instantaneously (83-84). This being the case, it is unlikely that the deceased would have been able to move the gear shift in a car from the park position to the drive position after being shot (84).

The witness identified People's Exhibit No. 4 as the bullet that was recovered from the wound track (87).

Detroit Police Officer Robert Wells

Detroit Police Officer Robert Wells testified that he was on duty in the early morning hours of July 21, 2008 (Jury Trial Transcript, 03/19/14, 95-96). On that date, around 2:30 a.m., he and his partner, Merri McGregor, had occasion to respond to the scene of a shooting in the area of 11032 Roxbury (96).

Upon their arrival at the scene, he observed a black male sitting in the driver's seat of a black Mercury Mountaineer with blood on his face (97). The male was unresponsive, and was conveyed to St. John's Hospital (97). He later found out that the person's name was Brandon Sheffield (97).

There were three witnesses at the scene: Adam McGrier, Kyra Gregory, and Camry Larry (98). He also found a spent shell casing at the scene (98). He and his partner preserved the scene (98).

On cross-examination, Officer Wells was asked if he did a canvass of the area and talked to any residents (99). He responded that he did not (99).

He was at the scene for about five hours (99-100). During that time, he cordoned off the area with crime scene tape (100).

He testified that the Mountaineer had crashed into a tree (100). He testified further that the spent casing that he found was found inside of the Mountaineer, on the floor board (100). He did not collect the spent casing himself, but left it intact for the evidence technicians (101).

Ronald Ainslee

Ronald Ainslee testified that he had formerly been a detective sergeant with the Michigan State Police, assigned to the laboratory at Bridgeport (Jury Trial Transcript, 03/20/14, 3-4). He was qualified as an expert in the field of firearms and toolmark identification (6).

In 2009, he received a 9 millimeter Luger class shell casing on People's Exhibit No. 21 (7). He entered the shell casing into the Integrated Ballistics Identification system (IBIS), which was a computer that would microscopically scan the face of a fired cartridge, that is where the firing pin of a gun would strike the primer, leaving striated markings (7). What the computer would then do is make an attempt to compare the fired cartridge casing to other fired cartridge casings within the

system, which would be generated from test-firing a particular firearm (8). If the computer indicated a match, the evidence would be called back, and looked at under a comparison microscope (8).

He then received the firearm on People's Exhibit No. 22 and test-fired it himself to get a sample fired casing (9-10). He compared the test-fired casing with the shell casing on People's Exhibit No. 21, and identified them as being from the same origin (10).

He also received a firearm on People's Exhibit No. 23, which he identified as a .380 auto caliber Bersa (11). He found that the casing on People's Exhibit No. 21 could not have been shot out of this firearm (11).

On examination by the Court, posed by a question asked by one of the jurors, the witness reiterated that he found from his comparison of the fired casing on People's Exhibit No. 21 to the test-fired casing from the gun on People's Exhibit No. 22 that both had been fired from the same weapon (42-43).

Camry Larry

Camry Larry testified that she was 21 years old (Jury Trial Transcript, 03/20/14, 47). She testified that Kyra Gregory was her cousin (47).

At around 2:30 a.m. on July 21, 2008, she was outside of her aunt's house, which was on the corner of Roxbury and Grayton (48). She was with Kyra, Adam McGrier, and Brandon Sheffield (48). She had only met Brandon and Adam the day before, at her sister's house (49). They had been driving around that night in Brandon's Moutaineer, which she identified as People's Exhibit No. 10 (50-51). They then ended up at her cousin's house on Roxbury (50). What they did when they got to Roxbury was watch a rap video that she and another of her cousins, Miranda, had made (49). They were watching the video on Kyra's laptop (49). At that time, Brandon was in the driver's seat

of the Mountaineer, Kyra was in the front passenger seat, Adam was in the rear seat behind Kyra, and she (the witness) was standing outside of the vehicle, at the driver's side window (49-50). Brandon had his window down (53).

As they were watching the video, a car rode past them on Roxbury (51). A guy in this vehicle leaned out of the front passenger window, and she looked at the guy, and the guy looked at her (51-52). The guy had something on his face from the nose down (52). This caused her concern, and that was when Brandon told her to get into the Mountaineer, and she got in the car behind Brandon (51-52). All that she saw in the vehicle as it went by were four heads, no faces (52). When she got back in Brandon's vehicle, she finished watching the video, which took about five minutes (53).

After they watched the video, a guy came up to Brandon's window with a gun (53). It was the same guy who had leaned out of the car that had gone by them, because the guy still had the white thing covering his face (53). The guy had a gun to Brandon's head, and the guy said, "Everybody get the fuck out the car" (53). She could tell that the guy was black and that he was tall and little, meaning thin (54). At this juncture in the trial, the prosecutor asked that Defendant stand up in court (55). The witness described Defendant as being tall and little (55).

When the gunman ordered everybody out of Brandon's vehicle, Adam and Kyra, who were in the front and rear passenger seats, got out of the vehicle on the passenger side (55). She tried to get out of the rear passenger door, the one that Adam had exited (55). She was on the floor in the backseat (55-56). She then heard a pow and a pop, and the back door opened, but she was only able to get halfway out, with the lower half of her body still in the vehicle, and then the vehicle started moving (56). She thought that the shot had missed Brandon, because Brandon's car was moving

(56). She tried talking to Brandon, telling him to stop the vehicle because she was under the car (56). The vehicle then hit a tree (56). When it stopped, and she was able to get out, she saw blood everywhere inside the car (56). When she saw this, she ran (56). She did not look to see if Brandon was injured, or where, or how he was sitting in the vehicle (56-57).

The witness was asked if, when she was able to get out of Brandon's vehicle, she saw the gunman around anywhere (57). She responded that she did not (57). Nor did she see the car that had gone past them earlier (57). All that she could say about this car was that it was dark-colored (57). She never did hear Brandon say anything to the gunman when the gunman was at the driver's side window with the gun pointed at Brandon's head (58).

Once she was out of Brandon's vehicle, she ran across the street to her aunt's house (58). She then stuck around for the police to show up, and she gave them a statement (59).

On cross-examination, the witness testified that she could not say what color the gun was that the gunman had (62).

As far as how it came to be that she was half out of Brandon's vehicle when the vehicle was moving, after the shot, was that Adam went out the rear passenger door, and then he shut the door behind him (63). She leaned over to try and open the door that Adam had gone out of, and she ended up on the floor (63-64). Once she got the door open, and got half of her body out the door, she was face up as the car was moving (64). Her arm hit the ground as the vehicle moved (64-65). Brandon's vehicle went the distance of about a house (65). When she was finally able to get out of the vehicle, she saw the blood splattered everywhere (65).

Finally, on cross, the witness clarified that she could not say for sure that the gunman was the guy who had been leaning out of the front passenger window of the vehicle that rode past them

(72). All she could say was that the gunman had a white thing on his face just like the guy in the car had had on his face (72).

Kyra Gregory

Kyra Gregory testified that in July of 2008, she lived at 1032 Roxbury (Jury Trial Transcript, 03/20/14, 75). She was present at this address the night that Brandon Sheffield was shot (75). She had just met Brandon the day before (75).

She had been with Brandon, Adam, and Camry riding around, and then they arrived at her house sometime after 2:00 a.m. (77). When they got back, they just sat in the car and watched videos on her laptop (77). She was seated in the front passenger seat, Brandon was in the driver's seat, Adam was in the rear passenger seat, and Camry was in the rear seat behind Brandon (77-78).

As they were watching the videos, a man appeared at the driver's side window (78). The man was engaged with Brandon (78). She had never see the man before (79). The man was not tall (78). The man had a gun to Brandon's head, and the man told everybody to get out of the car (79). She then heard a gunshot (79). After the shot was fired, she opened the passenger side door, and slid out of the car (79). The car started rolling after she got out (79-80). She ran into the backyard of a house across the street, and did not see anything after that (80). She then ran to her house, and woke her mom up, and they called the police (80). She gave the police a statement when they arrived (80).

On cross-examination, the witness was asked if, while she and the others were sitting in Brandon's vehicle watching videos on her laptop, there were cars driving by (82). She responded

that there were (82). She was asked if anything unusual happened with any of these cars (82), that is, if anybody in any of these cars was acting suspiciously (83). She responded in the negative (82-83).

Also on cross, the witness testified that initially Camry was outside of Brandon's vehicle with the laptop (83). Camry then got in the vehicle (84). She did not know what made Camry get in the vehicle (84).

Further on cross, the witness clarified that after the shot was fired, as she was trying to get out of Brandon's vehicle, the vehicle was in motion (86). It did not move fast, but rather, it was just rolling slowly (86). She was hopping out of the vehicle as it was rolling (86). She did not know whether Brandon had started the engine of the vehicle before it started rolling (86).

On recross examination, the witness was asked if she saw anybody else with a firearm that night (89). She responded that she did not (89). She was asked if it were not true that she saw Adam with a gun (89). She responded that she did not see Adam with a gun until after Brandon's vehicle hit a tree (89). What she saw then was Adam go to the trunk of Brandon's vehicle and get a firearm out of the trunk (89). She did not know what Adam did with the firearm (89).

Adam McGrier

Adam McGrier testified that Brandon Sheffield had been his best friend for three years (Jury Trial Transcript, 03/20/14, 90). He was aware of what kind of vehicle Brandon drove in 2008 (91). It was a 2008 Mountaineer, which he identified as being depicted in People's Exhibit No. 10 (91).

On the evening/early morning hours of July 20/July 21, 2008, they had been riding around, and eventually they arrived at a house on Roxbury at Grayton to drop one of their female companions off (91). They ended up sitting there for about 30 minutes (91). Present at this time were Brandon, Camry, the other young lady, and himself (92). They sat there and watched a video on a laptop (92).

As they were sitting there watching the video, a car pulled up alongside of them (93). The car that pulled up alongside of them was a black four-door car that looked to him like a Lumina (93). The passenger- side door of this vehicle was open (93). A person then got out of the car (93). This person was a male about his height, 6' (93-94). The person was wearing a mask hat, which prevented him (the witness) from seeing the man's face, and the man was all dressed in black (99). This person came up to Brandon's driver's side window (94). Brandon's driver's side window was open, and the man stuck a gun into Brandon's vehicle (94). Everybody in Brandon's vehicle froze, and then the man told everybody to get out of the car (94). The man pointed the gun all around in the car, and then he hit Brandon in the back of the head with the gun (95). The gunman told Brandon not to try anything slick (98). He (the witness) told Brandon to just get out of the car (95). Brandon looked at him and said okay (95). Brandon then told him to open his door, which he did (95). As he opened his door, the young lady in the front passenger seat opened her door (95). He then stuck his foot out of the car, and when he did that, Brandon threw the car into drive (95). He grabbed the young lady in the front passenger seat by the arm, and he and she jumped out and ran to the side of a house (95). As they were running, he heard a gunshot (95).

The gun that the gunman had looked to him like a .38 (96). It was all black (96).

After he ran to the side of the house, he heard a loud noise, like something hitting something else (96-97). His inclination was to run back to Brandon's car, but he was afraid that the people would still be around and that they would start chasing him (97). He did, nevertheless, come back out, and he was able to see the black car going up Roxbury towards Yorkshire (97). When it got to Yorkshire, it made a left (97).

He ran to Brandon's car and grabbed Brandon by the head because he saw blood throughout the car (97-98). He put his head on Brandon's chest to see if he was still breathing (98). Brandon was gasping (98).

He gave a statement to the police when they arrived (98).

On cross-examination, the witness reiterated that he saw the gunman get out of a car that had pulled up alongside the vehicle that they were in (Brandon's vehicle) (100). He was able to see three other people besides the gunman in this vehicle (101). These other three people were dressed in black, just as the gunman was (101). And the three other people also had bandannas or scarves covering their faces (101). He also saw the driver with a weapon as well as one of the passengers in the backseat (102). The people with the guns who stayed in the car had their guns pointed at them as the gunman got out of the vehicle (102).

The witness testified that the engine of Brandon's vehicle was running, but the vehicle was in park when they were just sitting there (105).

Also on cross, the witness was asked if he himself was armed with a weapon that night (106). He responded that he was not (106). He was asked if it were not true that he retrieved a firearm from Brandon's car at some point (106). He responded that he did get Brandon's belongings out of the vehicle, which included a BB gun (106-107).

Detroit Police Officer Eugene Fitzhugh

Detroit Police Officer Eugene Fitzhugh testified that he was assigned to the Crime Scene Services Unit (Jury Trial Transcript, 03/20/14, 110). He had been so assigned for 15 years (110).

In the early morning hours of July 21, 2008, he and his partner, Officer Wiiliam Niarhos, were called to the area of 11032 Roxbury (111). They received the call at 3:30 a.m., and they

arrived at the scene at 3:45 a.m. (112). By the time they got there, Homicide officers were there, and the scene was taped off with yellow crime tape (116).

Upon their arrival at the scene, he observed a 2008 Mercury Mountaineer, depicted in People's Exhibit No. 10, that had collided with a tree in front of 11032 Roxbury (113-115). 11032 Roxbury was the second house off of the corner of Grayton and Roxbury (15). There was nobody in the Mountaineer when they got there (116). The driver's side door of the vehicle was open, and there was suspected blood on the interior door panel (17). The front windows were in the down position, and the rear windows were in the up position (117). On the floor mat on the driver's side of the vehicle was a shell casing that he retrieved and put on evidence (118; 123). He identified People's Exhibit No. 21 as the shell casing that he collected (118). He described the shell casing as being a 9 millimeter Winchester brand Luger shell casing (118).

Detroit Police Homicide Officer JoAnn Miller

Detroit Police Homicide Officer JoAnn Miller testified that she had been a police officer for 27 years, and had been assigned to the Homicide Unit for 15 of those 27 years (Jury Trial Transcript, 03/24/14, 4).

On July 21, 2008, she was notified to go to 11032 Roxbury regarding a fatal shooting (4). She received this notification at around 3:00 a.m., and she arrived there at around 3:30 a.m. (4). When she arrived, she found the scene already preserved, with Officer LaTonya Brooks in charge of the scene (5). What caught her attention at the scene was a 2008 black Mountaineer that had collided with a tree (5). The victim had already been transported from the scene (5). Inside the vehicle, she observed a casing, on the driver's side (5). She also interviewed two young ladies,

from whom she took statements (5). And there was a young man at the scene, Adam McGrier, to whom she did not speak (5-6).

On cross-examination, the witness testified that the casing that she found was on the floor mat of the driver's side (7).

Detroit Police Sergeant Eric Bucy

Detroit Police Sergeant Eric Bucy testified that he had been with the Detroit Police 19 years (Jury Trial Transcript, 03/24/14, 10). He was currently assigned to the Second Precinct Detective Bureau (10).

He was on duty on October 18, 2008 (10). He was working with three partners that day: Officers Neinhagen, Combs, and Caldwell (10-11). They were in plainclothes in a semi-marked police vehicle, which had emergency lights in the interior (11). On that date, at around 1:00 a.m., he and his partners were on routine patrol, in the area of Fairport and East Seven Mile (11).

At the above time, in the above area, he observed Defendant, who he identified in court, with two other individuals on the corner of Fairport and Seven Mile (11-12). Defendant was dressed in dark clothing at that time: a black hoodie, blue jeans shorts, a black hat, and he was wearing gloves (12). The other two people with Defendant were Michael Hudson and Norman Clark (12). Hudson was also dressed in dark clothing, and Clark was dressed in regular clothing (12). These three individuals were just standing on the corner (12). At that location was Prince Pizza, which had been robbed a number of times (13).

He observed Defendant look in their direction, and then, all of a sudden, Defendant turned to the right, and started walking east (13). Clark also looked in their direction (13). He also noticed in Defendant's waistband the butt of a handgun protruding through Defendant's sweatshirt

(13). He notified his partners of what he had observed, and Officer Caldwell activated the interior lights, and they started following Defendant (13).

When he and his partners got to a position five feet behind Defendant, he saw both Defendant and Hudson step between two cars (14). He saw Defendant pull a handgun with a large magazine from his waistband, drop it to the ground, and kick it underneath one of the cars (14). Hudson pulled a .38 from his left pants pocket, dropped it to the ground, and kicked it under the same car that Defendant had kicked his gun under (14). Defendant then started walking in an eastbound direction, and Hudson started walking in the opposite direction (14). He and his partners then grabbed Defendant and Hudson, and he (the witness) grabbed Clark, who was closer to him (14).

Once all three individuals were secured, he recovered the weapons from underneath the car (15). He identified People's Exhibit No. 22 as the gun that he saw Defendant throw underneath the car: a Glock 9 millimeter, with a 30 round magazine containing 23 live rounds (15). He identified People's Exhibit No. 23 as a .380 caliber handgun with six live rounds (15). This was the gun that Hudson tossed under the car (15-16).

He described Hudson as 5'7", 200 lbs., braided hair, clean shaven, medium complexion, wearing a black shirt, a black hoodie, black shoes, and black pants (16-17). He described Defendant as 6'1", 170 lbs., with braided hair, a goatee and mustache, medium complexion, wearing blue jeans, a black do-rag, a black jacket, and a black shirt (17). He described Clark as being 5'10", 180 lbs., clean shaven, and medium complexion (17). He did not write down in his report what Clark was wearing (17). Clark was investigated and released at the scene (17).

On cross-examination, the witness testified that their semi-marked vehicle had "Detroit Police" on the outside driver's side and passenger's side doors in yellow (18). He testified that Defendant took his gloves off as he was walking across Seven Mile (21).

Sean McDuffie

Sean McDuffie testified that he was at the Wayne County Jail on a material witness detainer, so that it was fair to say that he did not want to be in court (Jury Trial Transcript, 03/24/14, 30-31).

He testified that he knew Defendant, who he identified in court (31). He had known Defendant for more than ten years (31). He also knew Michael Hudson, who he had known longer than he had known Defendant (31-32). He also knew Norman Clark (32). The four of them, he, Defendant, Hudson, and Clark were all friends with each other (32).

Back in 2008, he would see Defendant "basically every day" (32). He was asked if he was with Defendant as well as with Hudson in a car back in the summer of 2008, in the early morning, in the area of Kelly, Whittier, and Morang, and if he saw Defendant shoot somebody (32-33). The witness testified that he was not sure (33). He was asked if he was present when Defendant shot somebody in a new black truck (33). He responded in the negative (33). He was then asked if it were not true that he gave a statement to Officer Mullins of the Homicide Section on August 25, 2009, which he signed, and in which he told Officer Mullins, in answer to her question, "Tell me about the incident:"

> We were driving around down the street where the incident happened. Roderick said, "I know this guy, go back around the corner." Michael was driving. Roderick was in the front passenger side. I was in the backseat. We went around the corner. He walked over to the truck, like he was going to talk to the guy, and he pulled out a gun and shot him.
>
> (34).

He acknowledged that he did say this, and that it was true (35). He acknowledged that he also told Officer Mullins that after Defendant shot the guy, Hudson drove off, and they went to the home of Hudson's cousin (35). He (the witness) and Hudson got out of the car, and Defendant got in the driver's seat and drove the car away (35). He acknowledged that Defendant had a Glock 9 (36). The gun belonged to Terry, whose real name was Darnell Hicks, who was dead (36). The car that he, Hudson, and Defendant were in was a dark-colored Malibu or Neon (37).

He acknowledged that Officer Mullins asked him if Defendant said that he was going to shoot somebody before he actually shot somebody, and that he (the witness) answered in the affirmative, and that it was true (37). He also acknowledged that he told Officer Mullins that the area where Defendant shot somebody was Morang, Kelly, or Houston-Whittier (38). He acknowledged that he told Officer Mullins that Defendant fired one shot (39). He testified that the kind of vehicle that the victim was in was a new dark green truck (39). He acknowledged that he told Officer Mullins that there were four people in this truck, and that he saw people get out of the truck and run (39-40). He acknowledged that he told Officer Mullins that the guy who Defendant shot was light-skinned, and was sitting in the driver's seat, and that this was true (41). And he acknowledged that when asked if he knew what Defendant did with the gun, he responded, "He got locked up with it" (41).

The witness was asked if he had ever seen Defendant with the gun before he used it to shoot the guy in the truck (46). He responded that he had seen the gun before, but not in Defendant's possession (46). The witness was then asked if it were not true that at an investigative subpoena proceeding, he was asked if he had seen Defendant with the gun before that night, and whether he responded in the affirmative (47). The witness responded that if that question and answer were in the transcript of that proceeding, he probably did respond as the transcript stated (47).

On cross-examination, the witness was asked if it were not true that at the preliminary examination, he was asked who owned the gun before, to which he responded, "Norman Clark" (64-65). He acknowledged that this was what he had testified to (65). He testified that Norman Clark had, however, gotten the gun from Terry, had bought it from him (65).

Detroit Police Officer Kelly Mullins

Detroit Police Officer Kelly Mullins testified that she was assigned to the Homicide Unit, and that she was the officer in charge of this case (Jury Trial Transcript, 03/24/14, 73).

The witness testified that homicide cases were assigned to an officer in charge by rotation (74). That was how she became the officer in charge of this case (74). At the time that she was assigned this case, she had no leads as to who had killed the victim (74). All that she had was a spent casing that had been found inside of the victim's vehicle, which she sent to the Michigan State Crime Lab (74). She had no gun, however, to compare the spent casing to (74).

In July of 2009, she received information from the Michigan State Police about the casing found in the victim's vehicle (74). What she was advised of was the fact that the casing was found to have been fired from the gun on People's Exhibit No. 22 (75). And she learned that a person had been arrested with that gun, that person being Defendant (75). She then looked at who Defendant's

associates were, and, in August of 2009, she came across Sean McDuffie (75). She took a statement from McDuffie, which McDuffie signed (75). She showed McDuffie a photograph depicting Defendant with Michael Hudson, which she identified as People's Exhibit No. 17 (76).

On cross-examination, the witness testified that the victim's vehicle was dusted for fingerprints, and prints were lifted (77-78). These fingerprint lifts were compared to Defendant's fingerprints, and the results were negative (80).

Defense

The defense called no witnesses.

Verdict

Following arguments of counsel and the trial court's final instructions to the jury, the jury retired to deliberate at 3:03 p.m. on March 24, 2014 (Jury Trial Transcript, 135). At 4:10 p.m., the trial court announced that it had received a note from the jury that they had reached a verdict (136). The jury was brought into the courtroom and announced their verdict, finding Defendant guilty as charged (136-139).

Ginther Hearing

Defendant filed a Motion for New Trial alleging ineffective assistance of his trial counsel due to counsel's alleged failure to investigate and produce Michael Hudson at Defendant's trial. In Defendant's Motion, Defendant requested an evidentiary hearing as to his claim. Following is the testimony from the evidentiary hearing and the trial court findings of fact and decision:

Testimony

Witnesses

Defense

Luther Glenn

Luther Glenn testified that he was appointed to represent Defendant in this case (Evidentiary Hearing Transcript, 02/23/15, 8). He testified that he was appointed after the Court of Appeals reversed the trial court's (Judge Deborah Thomas's) grant of Defendant's Motion to Quash the Information and the Supreme Court denied Defendant's Application for Leave to Appeal the Court of Appeals's reversal, and after the matter was remanded back to the trial court for trial (8). By that time, the case had been reassigned from the docket of Judge Thomas to the docket of Judge Edward Ewell, Jr. (8).

When asked what his trial strategy was, the witness responded that it was to attack the credibility of Shawn McDuffie (10-11). He was aware, from reading the preliminary examination transcript and McDuffie's testimony at an investigative subpoena proceeding, that McDuffie was saying that when he observed what he observed, Michael Hudson was also present (11).

At some point, Defendant's family hired Miguel Bruce to investigate (12). He (the witness) did not direct Bruce as far as what to do (12). He did not recall if he talked to Bruce about whether he (Bruce) had interviewed Hudson, but he assumed that Bruce did interview him (12). He himself did not talk to Hudson prior to trial (12). He knew that Hudson was present a number of days during the trial (12). When asked why he did not talk to Hudson prior to trial, the witness responded that he had no intention of calling Hudson as a witness (12). He felt that anybody McDuffie could place in the car needed to be quiet (12).

On cross-examination, the witness was asked to read Hudson's Affidavit, which had been attached to Defendant's Motion for New Trial (16).[1] The witness was then asked what the down-side of calling Hudson as a defense witness would have been (16). He responded as follows:

> A Well, there are a number or (sic) [of] down-sides to calling him.
>
> Mr. Hudson was arrested with Mr. Pippen three months later when the alleged murder weapon was recovered. There were two guns recovered underneath the car.
>
> One of the officers specifically said that he saw Mr. Pippen with an extended clip from his waistband, something like that. And as he began to approach them, the two individuals were walking away and heard some noise, and two guns were recovered underneath a car.
>
> He didn't see anybody drop a gun or throw a gun, anything like that.
>
> What you have here, this gun with the extended clip has been implicated in a number of other shootings. My strategy at trial was to at least try to poke a hole or raise some type of doubt as to who actually had that weapon.
>
> Now if Mr. Hudson is on the stand, I would assume that he would say no, the gun with the extended clip wasn't in his possession. It was in Mr. Pippen's possession. That is a demerit that I didn't want to argue. I'm not going to concede that point.
>
> My whole point at trial was to say no, the murder weapon wasn't in Mr. Pippen's possession. It was in someone else's possession. That he never had the gun.

[1] A copy of Hudson's Affidavit is attached as **Appendix A**.

> Now if I put Mr. Hudson on the stand, and this question has to come up, why in the world would I bring another witness to come in and say, "Well, no, the murder weapon wasn't in my possession. It was in Mr. Pippen's possession." That makes no sense at all in my opinion.

(16-18).

Miguel Bruce

Miguel Bruce testified that he owned an investigative company, and had been in the investigation business since 2004 (Evidentiary Hearing Transcript, 02/23/15, 18-19). He testified that previously to that, he had been a Detroit police officer, and that he had worked patrol, homicide, and other non-fatal shootings (19). In his role as a private investigator, he worked mostly for the criminal defense (19).

He was familiar with Defendant (19-20). He had never met Defendant, but he met Defendant's father and sister, who hired him to do an investigation relative to Defendant's case (20). He was informed by Defendant's father and sister about what was going on with the case, and he received statements in the case (20). So, he became familiar with the facts of the case, and the prosecution's theory of the case (20). Reading the preliminary examination transcript and the investigative subpoena transcript, he became familiar with Shawn McDuffie's version of the events (21).

He interviewed one Michael Hudson sometime prior to the trial (22). Hudson was mentioned in McDuffie's statement as being the possible driver of the car that had been involved in the incident that Defendant was charged with (22). When he met Hudson, he asked Hudson about McDuffie's version of events (22). Hudson said that McDuffie was lying (22). Hudson said that

he had not been involved in the incident (22). Hudson said that McDuffie and his people were younger than "them," and that "they" did not socialize or hang around with McDuffie like that (22). He found Hudson to be believable (23). And Hudson was willing to testify, and he told Defendant's attorney, Mr. Glenn, of this (23-24). He also informed Glenn of what information Hudson had given him, and he told Glenn that he thought that Hudson was believable (24). His impression, after talking to Glenn, was that Glenn was going to reach out to Hudson (25). He (the witness) had no further involvement in the case after that (25).

On cross-examination, the witness was asked if he ever checked out Hudson's criminal history (26). He responded that he did not (26). He volunteered that he did not base his judgment of somebody based on his or her past or future (26). When asked if it was true then that the fact Hudson had three prior convictions of larceny from a motor vehicle would have made no impression on him, the witness responded that that was true, because everybody made mistakes (27). He testified that the same was true as far as Hudson's three convictions of receiving and concealing stolen property, and also as far as Hudson's 2003 conviction of receiving and concealing stolen property (27).

Michael Hudson

Michael Hudson testified that he stayed on the east side of Detroit (Evidentiary Hearing Transcript, 02/23/15, 29). He had grown up in Detroit (29). He knew Defendant, who he had known for 16 or 17 years (29). Defendant was a friend of his (29). He and Defendant had basically grown up together, had attended the same school, and they hung out a lot together (29).

He also knew Shawn McDuffie (29). He knew McDuffie sort of in the same way that he knew Defendant, that is, by having grown up together (29-30). McDuffie was a friend of his, and they had been friends for a while (30).

In October of 2008, he was arrested along with Defendant on Seven Mile (30). He was charged with carrying a concealed weapon, and pled guilty to that (30). He pled guilty because he was guilty (30). Defendant faced the same charge, and he believed that Defendant pled guilty as well (30). He (Hudson) had other criminal convictions, all of which he had pled guilty to (30).

There came a time that he became aware that Defendant had been arrested and charged with a homicide (30-31). He found this out from Defendant's sister (31). He also found at some point that McDuffie had told the police that he had seen Defendant commit the crime (31). When asked when he found this out, the witness responded that he found this out "during court" (31). He knew that McDuffie had told the police that he (Hudson) had been driving, so that he (Hudson) had been there and was a witness (31). None of this was true (31). There never was a time that he was driving with Defendant and McDuffie when Defendant asked him to stop the car, after which Defendant got out of the car and shot somebody (31). He had never seen Defendant shoot anybody (31).

When asked if he told anybody that McDuffie was lying, Hudson responded that he told anybody who asked (32). He told Defendant's private investigator, and he told Defendant's lawyer when they got a chance to step out into the hallway during the trial (32). He had told the private investigator that he did not know anything about the incident inasmuch as he had not been there (32). And he told the private investigator that McDuffie was lying (32). Defendant's attorney never contacted him during the trial (32).

He would have been willing to testify at Defendant's trial as a witness for Defendant (33). He attended Defendant's trial, where he watched McDuffie lie under oath (33).

On cross-examination, Hudson acknowledged that he had been previously convicted by his plea of guilty of three counts of larceny from a motor vehicle in 2005 (33). When asked if he had also been convicted by his plea of guilty of three counts of receiving and concealing stolen property, the stolen property being a motor vehicle, Hudson responded that he only pleaded guilty to one count of that (33-34). And he was convicted by his plea of guilty to the same offense in 2003 (34).

He was arrested on October 8 for carrying a concealed weapon, when he was on the corner of Seven Mile and Fairport (34). He was wearing dark clothing at the time (34). Defendant was with him, but he did not recall what kind of clothing Defendant was wearing (34). What was at the corner of Seven Mile and Fairport was a pizza palace, Prince Pizza (34). When asked what he and Defendant were doing there, Hudson responded that they were going to a gas station store that was across the street (35). When asked what they were doing on the same side of the street as Prince Pizza, Hudson responded that they were on that side of the street because the house that they had just come from was on that side of the street (35). It was when they got to the corner that the police pulled up (35). The officers got out of the police car and told them to, "Come here" (35). He did not go to the police, but kept walking across the street (35). He then threw a gun underneath a car (35). When asked what kind of gun he threw under the car, Hudson responded that it was a .38 (35).

When asked if Defendant also threw a gun underneath the car, Hudson responded that he did not recall (35). He did not see Defendant throw anything (35). When asked if it were not true that he and Defendant were walking together in between a couple of cars, Hudson responded that that

was not true (36). What happened was that when the police pulled up, he (Hudson) went one way and Defendant went another (36).

When asked if he had even seen Defendant carry a gun, Hudson responded that he had (37). But he never saw Defendant shoot anybody (37). When asked what Defendant carried a gun for, Hudson responded, "Protection, I guess" (38).

On redirect, Hudson was asked if he had come to court at some risk to himself (40). He responded that he had (40). He had a prior violation, and he knew that by coming to court, he would be going to jail (40). He explained that he was on parole, and that he had violated his parole (40). He knew that by coming to court, he would be exposing himself to the risk of being arrested (40). But he took that risk because he knew what McDuffie had told "them" was a lie (40).

On recross-examination, Hudson was asked if he knew that by coming to court, he would be arrested for parole violation (40). Hudson responded that he assumed that he would be arrested (40). When asked if he knew that somebody from the Michigan Department of Corrections would be there when he got there, Hudson responded that he assumed that that would be the case (41).

Prosecution

Bud Barnett

Bud Barnett testified that he was employed by the Michigan Department of Corrections as an investigator with the Absconder Recovery Team (Evidentiary Hearing Transcript, 02/23/15, 42). He testified that he had been so employed for 13 years (42).

The witness testified that he had been informed by the appellate prosecutor in this case (this writer) that Michael Hudson would be appearing in court on this date (43). Hudson, he explained, had been on abscond status since July 7, 2014, and they (his Unit) had been trying to locate him (43).

Based on the phone call they received from this writer, he and his partner came to court this day (the day of the evidentiary hearing) (43).

They had been in the courthouse since 1:00 p.m.[2] He and his partner had been out in the hallway before court started (43). He did not actually see Hudson arrive, but he saw Hudson at some point sitting out in the hallway (43). Prior to his approaching Hudson, Hudson had exited the building twice and had come back in (43). Concerned that Hudson knew who he and his partner were, and that Hudson was going to leave, he approached Hudson, and told him that there was a warrant for his arrest (44). Hudson was startled at first, but then, he told Hudson that as long as he stayed on the floor that the courtroom was on, he could testify, but if he left, he (the witness) would take him into custody (44). Hudson agreed to stay on the floor that the courtroom was on (44).[3]

Trial Court's Findings and Decision

> THE COURT: The defense has filed a motion claiming ineffective assistance of counsel due to trial counsel's failure to call potential witness, Michael Hudson, to testify in Mr. Pippen's trial.
>
> The defense's claim is that Mr. Hudson, if called, would have directly disputed the testimony of witness, Shawn McDuffie, who was the key prosecution witness in this murder case.
>
> In evaluating the issue of ineffective assistance of counsel, the Court, of course, is mindful of the decision in *People v Pickens*, found at 446 Michigan, 298, a 1994 Supreme Court decision indicating that the Court must examine ineffective assistance of counsel claims under the standard set forth in *Strickland v*

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[2] The evidentiary hearing in this case commenced at 3:00 p.m.

[3] The People would note that according to the Michigan Department of Corrections Website, Michael Hudson has, once again, absconded from parole, the date being August 17, 2015 (see **Appendix B**).

Washington, found at 466 US 668, a 1984 United States Supreme Court decision.

There is obviously a requirement that there be a showing that the trial counsel, Mr. Glenn's performance, was in fact ineffective, deficient with regards to performance, reasonable performance, and also there must be showing that as a result of that performance, it did in fact prejudice the defense.

In this case, the prosecution's case essentially rested on the testimony of Shawn McDuffie, who claimed to be an associate and friend of Mr. Pippen, also someone who knew Mr. Hudson.

And that Mr. McDuffie, when provided with the opportunity to get a break on his own case for which he was on Holmes Youthful Trainee status, testified about being in a vehicle with Mr. Hudson and Mr. Pippen, seeing an SUV in this residential area that was certainly described as being in the area of where the homicide took place.

Mr. McDuffie did in fact testify that Mr. Pippen got out of the vehicle, walked out of the vehicle that he and Mr. Hudson and Mr. McDuffie were in. Walked over to the vehicle where the deceased was seated behind the wheel, and that the driver was in fact shot and killed.

There were other passengers in the vehicle at the time of the shooting along with the deceased. Their descriptions of the events were in a number of respects contradictory in the sense that it didn't follow one another exactly.

Mr. Reynolds, the prosecutor, argued that certainly it was a startling and scary moment for which any reasonable person could conclude that this was a frightening experience and the people's recollection would not be precise.

So, Mr. McDuffie was a key witness for the prosecution in terms of placing Mr. Pippen at the scene of the homicide, committing the shooting.

But there was another important key piece of evidence, and that was almost 90 days after this particular homicide, Mr. Hudson and Mr. Pippen were seen by a Detroit police officer late in the evening in front of a business establishment, that the officer was

certainly concerned that there might be some possible criminal activity that was going to take place, most likely a robbery, and that he did in fact get out to investigate.

That Mr. Hudson and Mr. Pippen left the area once the officer walked in their direction, and both individuals, Mr. Hudson and Mr. Pippen, did in fact discard pistols.

The officer testified that the pistol that was discarded by Mr. Pippen, the one that he observed Mr. Pippen discard, did in fact turn out to be the murder weapon.

It was in fact examined by the firearms examiner, and it did in fact match the spent casing found inside the vehicle where the deceased was found.

So, Mr. McDuffie's testimony is certainly corroborated by the fact that there was evidence to indicate that this was in fact the murder weapon and that Mr. Pippen did in fact have the murder weapon still in his possession some 90 days after the homicide.

The defense contends that it was ineffective assistance of counsel not to call Mr. Hudson, and Mr. Hudson would have cast doubt and disputed the testimony of Mr. McDuffie and portrayed Mr. McDuffie as someone who was lying, and that Mr. McDuffie should not be believed.

However, in this particular matter, the Court is also mindful of looking at that potential testimony of Mr. Hudson in light of the fact that under *People v Hoag,* found at 460 Mich 1, a 1999 case, that the Court must defer in many instances to the defense strategy if it is appearing to be a sound trial strategy.

And the Court in hindsight can't look back and say that to second guess what the defense at trial could have done or should have done turned out to be unsuccessful strategy.

In this particular case, Mr. Hudson getting on the stand to testify for the defense certainly would have corroborated Mr. McDuffie's testimony to the effect that Mr. Hudson, Mr. McDuffie, and Mr. Pippen certainly knew each other.

Mr. Hudson's getting on the stand, I think, would have further accentuated the notion of the fact that the guns were in fact discarded by both Mr. Hudson and Mr. Pippen.

It seems extraordinary to me that Mr. Hudson would have sought claim or claimed (sic) that he was the one who discarded the murder weapon, and it would have further corroborated the testimony of the officer who said it was Mr. Pippen who discarded the murder weapon.

Mr. Glenn, as trial counsel, in this Court's view, has, I think, ample reason not to want to call someone like Mr. Hudson, who, I think, does equal damage to Mr. Pippen, compared to what benefit he might possibly bring.

I think that it would be very sound trial strategy not to call Michael Hudson to the stand.

I do find after a review of the transcript again and review of the testimony that was presented here at the evidentiary hearing, that the *Strickland* standard has not been met.

I do not find that Mr. Glenn was ineffective in his handling of the trial, and for that reason, the Motion for a New Trial is denied.

(Evidentiary Hearing Transcript, 04/16/15, 3-8).

Argument

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy; furthermore, the failure to interview witnesses does not itself establish ineffective assistance of counsel unless it is shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the defense. Defendant's trial counsel testified at the evidentiary hearing that he chose not to call Michael Hudson as a witness because his testimony would reinforce the fact that Defendant was in possession of the murder weapon 90 days after the murder; furthermore, Hudson had been previously convicted of five theft-related offenses, which could have been used to impeach his credibility, and he also told a ludicrous story about how he did not see Defendant discard what turned out to be the murder weapon when he (Hudson) was in close proximity to Defendant when he himself (Hudson) also discarded a gun, both guns being thrown under the same car. Defendant has not sustained his burden of establishing ineffective assistance of counsel due to trial counsel's "failure" to interview and call Hudson as a defense witness.

A) Defendant's Claim

Defendant's sole claim on appeal is that his trial counsel was ineffective in failing to investigate and present the testimony of Michael Hudson at Defendant's trial.

B) Counterstatement of Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

C) The People's Position

i) The law pertaining to claims of ineffective assistance of counsel generally

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court explained that when evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment to the United States Constitution or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[4] In order to establish ineffective assistance of counsel, the defendant must make two showings. First, he must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense.

Under the first requirement, defense counsel's performance must be measured against an objective standard of reasonableness, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and not counsel's subjective state of mind. *Harrington v Richter*, 562 US 86, 110; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id*. Furthermore, every effort must be made to eliminate the distorting effects of hindsight, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In other words, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. *Premo v Moore*, 562 US115, 132; 131 S Ct 733, 745; 178 L Ed 2d 649 (2011), citing *Harrington v Richter*,

[4] It would seem that more recent United States Supreme Court cases which cite and apply *Strickland*, one of which the People will be citing, would be applicable as well.

supra. Indeed, "[i]t is 'all too tempting to second-guess counsel's assistance after conviction or adverse sentence.' " *Id*., citing and quoting from *Strickland,* 466 US at 689; 104 S Ct at 2065. Thus, a court should neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor evaluate counsel's competence with the benefit of hindsight. *People v Matuszak,* 263 Mich App 42, 58; 687 NW2d 342 (2004). Stated differently, even where review is de novo, the standard for judging counsel's representation has to be a most deferential one. *Premo v Moore,* 562 US at 122; 131 S Ct at 740. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, interacted with the client, with opposing counsel, and with the judge." *Id*. Furthermore,"[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practiced or most common custom." *Premo v Moore, supra*. And finally, as far as the deficient performance prong, a court reviewing counsel's performance "is required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons . . . . counsel may have had for proceeding as they did." *Cullen v Pinholster,* 563 US170, 196; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011), quoting from *Pinholster v Ayers,* 590 F3d 651, 692 (CA 9, 2009) (Kozinski, CJ, dissenting). *Strickland* does, after all, as noted previously, "call for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Cullen, supra*, 131 S Ct at 1407, quoting from *Richter, supra*, 131 S Ct at 791.

Under the prejudice component, a court must conclude, upon a finding of deficient performance, that there is a reasonable probability that, absent the deficient performance, the factfinder would have had a reasonable doubt respecting guilt. *Pickens, supra,* 446 Mich at 312;

People v Poole, 218 Mich App 702, 717; 555 NW2d 702 (1996). In other words, the defendant must show that there is a reasonable probability that, but for the deficient performance, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). At the very least, the likelihood of a different result must be substantial, not just conceivable. *Harrington v Richter*, *supra*, 131 S Ct at 792.

Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008), citing and quoting from *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

a) The law pertaining to a claim that counsel failed to investigate and failed to call witnesses

Defense "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 US at 691; 104 S Ct at 2066.

In addition, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey, supra*, 237 Mich App at 76. Defense counsel is afforded wide latitude on matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and a reviewing court should not substitute its judgment for that of defense counsel, or review the record with the added benefit of hindsight on such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), or second-guess defense counsel's

judgment on matters of trial strategy. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

As far as the prejudice prong, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).[5] Similarly, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

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[5] The People are cognizant that the Court of Appeals has defined a substantial defense as one that might have made a difference in the outcome of the trial. *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012); *People v Hyland*, 212 NW2d 701, 710-711; 538 NW2d 465 (1995). The People do not believe that the Court of Appeals meant, by this language, that a defendant can sustain his burden of showing prejudice by making a showing that it is merely possible that a different result would have ensued had the defendant's trial counsel put on the defense or the witness that the defendant claims that his trial counsel should have presented. If, however, that is how the language contained in the Appeals Court's Opinions are to be read, it would be the People's position that such interpretation of the prejudice prong is contrary to the clear language of *Strickland*, as adopted by this Court in *Pickens*. The fact is that both of the Court of Appeals's cases cite directly or indirectly to *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990), which in turn cites to *People v Foster*, 77 Mich App 604, 609; 259 NW2d 153 (1977), which is, in fact, a pre-*Strickland* case.

The correct standard, the People believe, would be that the defendant does not sustain his burden of showing ineffective assistance of counsel from the alleged failure to investigate or call a witness unless he shows that there is a reasonable probability that had the witness's testimony been presented, there would have been a different result. In fact, as the United States Supreme Court observed in *Harrington v Richter*, *supra*, 131 S Ct at 792, "[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. (Citations omitted). Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. (Citations omitted). This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case.' (Citation omitted). The likelihood of a different result must be substantial, not just conceivable. (Citation omitted)."

ii) Discussion

Defendant argues that trial counsel's initial failing in this case was his failure to even interview Michael Hudson prior to trial.

The People do not dispute that Defendant's trial counsel did not interview Hudson prior to trial. Hudson was interviewed by a private investigator, Miguel Bruce.[6] Defendant's trial counsel testified that the reason that he did not interview Hudson was because he had no intention of calling Hudson as a witness. His explanation of why he had not planned to call Hudson as a witness was two-fold: (1) he felt that anybody McDuffie could place in the car needed to be quiet, and (2) Hudson would have reinforced the testimony that Defendant had been in possession of the actual murder weapon 90 days after the murder. On this latter point, Defendant's trial counsel explained that Hudson and Defendant were observed by a police officer throwing guns underneath a car, one of which was the murder weapon, and if Hudson would have testified, as one would expect that he would, that the gun that he had was not the gun that turned out to be the murder weapon, this would mean by process of elimination that the gun that Defendant discarded was the murder weapon.[7]

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[6] Defendant's trial counsel testified that he did not recall if he talked to Bruce about whether he (Bruce) had interviewed Hudson, but he assumed that Bruce did interview him. Bruce testified that he told Defendant's attorney, Mr. Glenn, that Hudson was willing to testify, and he also informed Glenn of what information Hudson had given him, that is, that McDuffie was lying, and he told Glenn that he thought that Hudson was believable.

[7] On the first point, of trial counsel's concern about showing a close association between Hudson and Defendant and McDuffie, Miguel Bruce testified that Hudson told him that McDuffie and his people were younger than "them," and that "they" did not socialize or hang around with McDuffie like that. Hudson testified, on the other hand, that Defendant was a friend of his, that he and Defendant had basically grown up together, had attended the same school, and hung out a lot together, and that he knew McDuffie sort of in the same way that he knew Defendant, that is, by having grown up together, and that McDuffie was a friend of his, and they had been friends for a while.

These were valid strategic considerations. And again, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey, supra,* 237 Mich App at 76. Defense counsel is afforded wide latitude on matters of trial strategy, *Odom, supra,* 276 Mich at 415, and a reviewing court should not substitute its judgment for that of defense counsel, or review the record with the added benefit of hindsight on such matters, *Payne, supra,* 285 Mich App at 190, or second-guess defense counsel's judgment on matters of trial strategy.

It has been observed that the failure "to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the defense." *People v Caballero,* 184 Mich App 636, 642; 459 NW2d 80 (1990).

The question, then, is whether Hudson's testimony would have been valuable evidence which would have substantially benefitted the defense. The People submit that Hudson's purported testimony would not have been valuable evidence that would have substantially benefitted the defense.

First, Hudson had been previously convicted of five theft-related offenses (three counts of larceny from a motor vehicle, arising from an incident on October 18, 2005; one count of receiving and concealing stolen property, arising out of an incident on August 24, 2004; and another count of receiving and concealing stolen property, arising out of an incident on September 12, 2003), all of which he could have been impeached with under MRE 609. The trial court noted during argument following the evidentiary hearing in this case that Hudson did carry this baggage (of prior theft-related convictions) (Evidentiary Hearing Transcript, 02/24/15, 13).

Second, Hudson testified on direct examination at the evidentiary hearing that in October of 2008, he was arrested along with Defendant on Seven Mile. He was charged with carrying a concealed weapon, and pled guilty to that. He pled guilty because he was guilty. Defendant faced the same charge, and he believed that Defendant pled guilty as well.

On cross-examination, Hudson testified that in the incident of October, 2008, he threw a gun underneath a car. When asked what kind of gun he threw under the car, Hudson responded that it was a .38. When asked if Defendant also threw a gun underneath the car, Hudson responded that he did not recall. He did not see Defendant throw anything. When asked if it were not true that he and Defendant were walking together in between a couple of cars, Hudson responded that that was not true. What happened was that when the police pulled up, he (Hudson) went one way and Defendant went another.

Detroit Police Sergeant Eric Bucy gave a different account. On October 18, 2008, he was working with three partners, in plainclothes in a semi-marked police vehicle, which had emergency lights in the interior. On that date, at around 1:00 a.m., he and his partners were on routine patrol, in the area of Fairport and East Seven Mile. He observed Defendant, who he identified in court, with two other individuals, Michael Hudson and Norman Clark, on the corner of Fairport and Seven Mile. He observed Defendant look in their direction, and then, all of a sudden, turn to the right and start walking east. Clark also looked in their direction. He also noticed in Defendant's waistband the butt of a handgun protruding through Defendant's sweatshirt. He notified his partners of what he had observed, and Officer Caldwell activated the interior lights, and they started following Defendant. When he and his partners got to a position five feet behind Defendant, he saw both Defendant and Hudson step between two cars. He saw Defendant pull a handgun with a large

magazine from his waistband, drop it to the ground, and kick it underneath one of the cars. Hudson pulled a .38 from his left pants pocket, dropped it to the ground, and kicked it under the same car that Defendant had kicked his gun under. Defendant then started walking in an eastbound direction, and Hudson started walking in the opposite direction.

According to Sgt. Bucy's account, there would have been no way that Hudson would not have seen Defendant throw a gun underneath the car, the same car that Hudson threw his own gun under *after* Defendant threw his gun under that car. And yet Hudson testified that he did not see Defendant throw any gun, which was ludicrous.

Hudson was also asked if he had even seen Defendant carry a gun, and Hudson responded that he had. But he never saw Defendant shoot anybody. When asked what Defendant carried a gun for, Hudson responded, "Protection, I guess." Sgt. Bucy testified that the gun that he saw Defendant throw underneath the car was a Glock 9 millimeter, with a 30 round magazine containing 23 live rounds. Hudson's testimony that Defendant probably carried such a weapon for protection was also ludicrous.

The above are three examples showing why a jury would likely have found Hudson's testimony not to be credible, but would have simply viewed it as a feeble attempt to get his friend out from under a murder charge.

Relative to the prejudice prong of *Pickens/Strickland*, which should also be considered is the strength of the prosecution's case.

The People acknowledge that their key witness, Sean McDuffie, did have credibility issues – for example, on direct examination, when asked by the prosecutor if he remembered being with Defendant and Hudson in the area of Kelly, Whittier, and Morang in the early morning hours in the

summer of 2008, when Defendant shot somebody, McDuffie responded that he was not sure, and when asked by the prosecutor point blank if he was present when Defendant shot somebody in a new black truck, McDuffie responded in the negative, and it was only after being shown his statement to the police that McDuffie acknowledged that he did witness Defendant shoot a person in a new truck – but McDuffie's testimony was corroborated by other evidence.[8]

Camry Larry testified that the car that went by them the first time was dark colored. McDuffie testified that the car that he, Defendant, and Hudson were in was a dark-colored Malibu or Neon. Adam McGrier testified that the car that pulled up alongside of them looked like a black, four-door Lumina. The Chevy Lumina and the Chevy Malibu are similar-looking vehicles. Thus, McDuffie's description of the vehicle that he was in was consistent with what the eyewitnesses said.

McDuffie testified that the gun that Defendant had was a Glock 9, which, according to McDuffie was the same gun that Defendant got locked up with. This was the type of gun that Defendant was caught with three months later, that is, a Glock 9 millimeter. Thus, McDuffie got the type of gun part right.

McDuffie testified that the victim was in a dark-colored truck. The victim was in a black Mountaineer. A Mountaineer is a small Mercury SUV, which is a truck-like vehicle. And McDuffie said that the victim's vehicle was dark green. The victim's vehicle was actually black, but black could be mistaken for dark green at night. Thus, McDuffie's testimony about the victim's vehicle was consistent with the facts.

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[8] McDuffie, like Hudson, had also been previously charged with a felony, but the felony was carrying a concealed weapon, which was not a theft-related offense as Hudson's prior convictions were.

McDuffie testified that there were four people in the victim's vehicle, and that he saw the people get out of the vehicle and run. This testimony was consistent with the facts.

And there was other circumstantial evidence pointing to Defendant as the shooter.

Camry Larry described the shooter as being black, tall, and little, meaning thin. When Defendant was asked to stand up in court, Larry described Defendant as being tall, thin, and little. Sgt. Bucy described Defendant, who he arrested on October 18, 2008, as being 6'1" and 170 lbs., which is essentially the description of a person who is tall and thin.

Adam McGrier testified that the shooter was around his height, which was 6'. Again, Sgt. Bucy testified that the Defendant was 6'1".

Based on all of the above, it is the People's position that Defendant has not sustained his burden of establishing ineffective assistance of counsel requiring reversal of his convictions.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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